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IN THE

SUPREME COURT OF THE UNITED STATES

No. 313

BERT SMITH,
Petitioner,

v.

J. TURNER BUTLER and WILLIAM A. HALLOWES, III,
As Trustees of the Property of Florida East Coast Railway Company, a Florida Corporation,
Respondents.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

PETITIONER'S REPLY BRIEF ON THE MERITS

WILLIAM S. FRATES, of
NICHOLS, GAITHER, GREEN,
FRATES & BECKHAM,
1111 Brickell Avenue,
Miami 32, Florida,
Counsel for Petitioner.

E. L. MENDENHALL, INC., 1108 Oak Street, Kansas City 6, Mo., HArrison 1-3030

INDEX

This Court Has Jurisdiction 1
This Court Should Reverse the Judgment Below 4
Petitioner Did Not Voluntarily Take the Test 7
Normal Procedure for Medical Department to Determines Fitness 8
No Such Test Ever Given Before 10
Flagmen Do Not Have to Walk a Mile 11
Petitioner Had Always Done His Job Properly 12
Respondents' Version of Facts Rejected by Jury 12
Conclusion 13

Table of Cases

Andrews v. *Cardozo*, (Fla. App. 1957) 97 So.2d 43 3
Dunn v. *Conemaugh & Black Lick Railroad*, (3rd Cir., 1959) 267 F.2d 571 13
Gant v. *City of Oklahoma City*, 289 U.S. 98 2
Grayson v. *Harris*, 267 U.S. 352 2
Montgomery v. *Stary*, (Fla. 1955) 84 So.2d 34 3
Northern P. R. Co. v. *Concannon*, 239 U.S. 382 7
Nuttall v. *Reading Company*, (3rd Cir., 1956) 235 F.2d 546 13
Rogers v. *Missouri Pacific Railroad Co.*, 352 U.S. 500 7
Romano v. *Palazzo*, 83 Fla. 243, 91 So. 115 3
Steele v. *Louisville & N. R. Co.*, 323 U.S. 192 2
Stroble v. *State of California*, 343 U.S. 181 2

Authorities Cited

Florida Rule of Civil Procedure, 1.37 (b) 3
Florida Statutes, 92.22 4

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No. 313

BERT SMITH,
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J. TURNER BUTLER and WILLIAM A. HALLOWES, III,
As Trustees of the Property of Florida East Coast
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ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

PETITIONER'S REPLY BRIEF ON THE MERITS

Respondents contend that this Court has no jurisdiction because the judgment below could have been (although it was not) based on an adequate nonfederal ground. They also contend that the decision below is correct on the facts.

1. This Court Has Jurisdiction

Respondents' jurisdictional argument is based on a misconception of both federal and Florida law. Respondents admit that the federal question was decided below;

but contend this Court lacks jurisdiction because the court below could have decided the case on an adequate state ground. This Court rejected the identical argument in *Grayson* v. *Harris*, 267 U.S. 352, 358:

> "* * * The rule that when the decision of a state court may rest upon a nonfederal ground adequate to support it, this court will not take jurisdiction to determine the federal question, has no application where, as here, the nonfederal ground might have been considered by the state court but was not. Rogers v. Hennepin County, 240 U.S. 184, 188, 189, S.Ct. 217, 60 L. Ed. 469; Henderson Bridge Co. v. Henderson City, 173 U.S. 592, 608, 19 S.Ct. 553, 43 L.Ed. 823. * * *."

The *Grayson* case is followed in *Steele* v. *Louisville & N.R. Co.*, 323 U.S. 192; and in *Stroble* v. *State of California*, 343 U.S. 181, Cf. *Gant* v. *City of Oklahoma City*, 289 U.S. 98.

Respondents' argument is equally invalid under Florida law. The trial judge rejected respondents' claim that the proffered testimony was not in proper form, and the Florida appellate court did not even deem the point worthy of discussion. The trial judge held the proffered testimony was in proper form but that the evidence was inadmissible because of the appellate holding that there "was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test." 104 So.2d 869. It would have been an idle ceremony to require the jury to hear three days of testimony which the appellate court had already held did not create a jury question. The matter is explicitly ruled on at R. 360:

> "MR. DANIELS: Maybe I didn't understand. I thought you held that we could not proffer it.

THE COURT: No, I let you proffer it and I just excluded the proffer.

MR. DANIELS: Oh, you accept it as a proper proffer, but you hold that it is inadmissible?

THE COURT: That's right."

Florida, like most jurisdictions, requires a proffer of excluded evidence so that the reviewing court can determine whether the proffered evidence was material and its exclusion was harmful. E.g. *Andrews* v. *Cardozo*, (Fla. App. 1957) 97 So.2d 43; *Montgomery* v. *Stary*, (Fla. 1955) 84 So.2d 34; *Romano* v. *Palazzo*, 83 Fla. 243, 91 So. 115. The procedure for making a proffer is specified in Florida Rule of Civil Procedure, 1.37(b):

> **"Record of Excluded Evidence.** In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged."

This rule merely requires the "examining attorney [to] make a specific offer of what he expects to prove." Pursuant to this Rule, counsel for petitioner proffered the testimony of the first trial as what he expected to prove. The trial judge then held the proffer was in proper form but that the evidence was inadmissible because it created no justiciable issue under the FELA (R. 360).

Respondents' reliance on F.S. 92.22[1] is misplaced. This statute deals with the use of former testimony "*as evidence* upon any subsequent trial or hearing". In the present case, the former testimony was not used "as evidence". It was merely used to document a proffer of excluded evidence as required under Florida practice.

2. This Court Should Reverse the Judgment Below

Respondents' position in this Court bears but scant resemblance to that which it successfully argued below. In the Florida courts, respondents contended that no matter what the evidence or what motives were involved, their right to give the field test could not be questioned in an FELA action. This position was stated as follows:

---

1. 1 Fla. Stat. 1959, p. 353, Sec. 92.22. This statute provides:

"92.22 *Use of former bills of exceptions as evidence; use of evidence given on former trial.*—In the event it be made to appear to the satisfaction of the court that any evidence used at a trial of a civil case, whether oral or written, and incorporated in a bill of exceptions, or incorporated in the record proper can not be had, then the bill of exceptions taken at the trial, or the evidence incorporated in the record of the trial, may be used as evidence upon any subsequent trial or hearing of the case, or in any other civil cause or civil proceeding, as to any matter in issue at a previous trial or hearing; and, further, in the event that such evidence is not so preserved as before stated, then the same may be used at a subsequent trial or hearing, or in any other civil cause or civil proceeding involving substantially the same issue; if (1) such evidence has at such former trial been reported stenographically or reduced to writing in the presence of the court; (2) that the party against whom the evidence is offered, or his privy, was a party on the former trial; (3) that the issue is substantially the same in both cases; (4) that a substantial reason is shown why the original witness or document is not produced; and, (5) that the court is satisfied that the report of such evidence taken at such former trial is a correct report."

"Mr. Frates [Counsel for petitioner]: Your Honor, one of the contentions here is that this was not an authorized test. This was something that was specifically pointed out for Bert Smith and that, as we told the jury, it was a spite test in an effort to get rid of him.

Mr. Sullivan [Counsel for respondents]: Your Honor, if Mr. Frates is trying a labor case he's in the wrong court.

Mr. Frates: I'm not trying a labor case.

Mr. Sullivan: That's what this seems to come down to.

Mr. Frates: No, it doesn't, your Honor.

Mr. Sullivan: That's what all these remarks all morning have been directed to. That isn't the theory of the case.

Mr. Frates: The theory is that they had no right to take him out there and when they do a wrongful act—

Mr. Sullivan: We better get in a court that has jurisdiction of a labor case." (R. 66).

* * *

"Mr. Sullivan: Your Honor, at the same time I'd like to make at this time a motion to dismiss all the allegations of the Complaint that pertain to the right to give a field test or the circumstances under which it was given, on the grounds that the Court lacks jurisdiction over that; that that's simply a labor matter covered by a separate statute.

It is not a common-law or Federal Employers Liability Act case. It is not incorporated within the scope of such a case, and it is under this federal statute.

In addition, we'd like to move the Court to strike all the testimony about the actual test and the circumstances under which it was given; that is, where Mr. Bert Smith was made to walk, and his testimony and the testimony of other witnesses concerning the condition of the right of way that day.

> We'd like to move to strike all the other testimony pertaining to whether or not they're entitled to give a test like this, whether or not such test has ever been given before. We feel it isn't a matter for this Court. It's a labor matter covered by federal statute." (R. 187-188).

The trial judge rejected respondents' argument (R. 189) and was reversed on appeal for doing so. The Florida appellate court squarely held that:

> "* * * There was no justiciable issue, at least under the Federal Employers' Liability Act, that could be raised as to the propriety or right of the appellant to give the test. If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act, 45 U.S.C.A., §151 et seq. Consequently we do not consider that items 1 and 2 under the charge of negligence, supra, constituted triable issues . . ." 104 So.2d at 869-870.

The Florida appellate court went out of its way to point out that it was not attempting to weigh the evidence in an FELA case, stating:

> "An appellate court is always reluctant to reverse a judgment based on a jury verdict for in doing so, it of necessity must sit in judgment of the facts which appear in a cold typed record without the benefit of observing the demeanor and conduct of the witnesses on the stand. However, it is another matter to reverse a cause for new trial when the record of that trial clearly shows that the cause was tried on immaterial issues serving to implant in the minds of a jury prejudice or bias against one of the parties . . ." 104 So.2d 870.

Respondents have completely shifted gears in this Court. They now tacitly admit that petitioner's claim is legally sound but should be rejected because "clearly

unsupported by the record in this cause. * * *." (Brief of Respondents, p. 14). Our reading of respondents' brief discloses no assertion that railroads can devise "field tests" to force retirement. Instead, respondents limit themselves to a factual argument that this is a simple case where an employee was injured while willingly performing a routine field test to determine his physical fitness as a flagman.

Respondents' entire brief is based on the unexpressed major premise that this Court can and should resolve factual questions which were neither raised nor considered below. This premise is doubtful at best. Compare *Northern P. R. Co.* v. *Concannon*, 239 U.S. 382. Be that as it may, respondents' factual assertions are as erroneous as the legal theory which prevailed below. Respondents have wholly failed to state the record in the required light when the issue is whether a plaintiff's FELA jury verdict should be set aside. Cf., *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U.S. 500.

Petitioner Did Not Voluntarily Take the Test

Respondents' intimation that petitioner consented to and willingly took the field test is contrary to the uncontradicted record. Petitioner was admittedly told to take the test or retire (R. 33-34); and, through his union representatives, filed a formal protest against the test (R. 36-40). Respondents' Trainmaster, C. T. Clark, ordered the test and testified as follows:

> "Q. But, actually, you ordered him there as his superior, didn't you? You sent him a letter and told him to report out there.
>
> A. That's correct.
>
> Q. This is something he didn't do under his own volition.

A. That's correct.

Q. Were you given a letter of protest by his representative, and incidentally, you invited him to have a representative there, did you not?

A. Yes, sir . . ." (R. 36).

Normal Procedure for Medical Department to Determine Fitness

The record refutes respondents' claim that petitioner was given a routine test to determine his physical fitness as a flagman. Respondents' Trainmaster urged petitioner to retire and told him he would have to take the test if he did not do so (R. 33-34, 59-60, 152). Until this ultimatum, questions of physical fitness had always been left to the railroad's medical department. A sick employee could not return to work until the medical department gave him a fit for duty slip (R. 25-26, 70); and respondents' supervisors could order a physical examination of any employee whose fitness was questioned (R. 31-32).

Petitioner was declared fit for duty as a flagman by respondents' local doctor in Miami in August of 1956 (R. 27-28). This medical opinion was confirmed by respondents' chief surgeon who examined petitioner on September 10, 1956 (R. 75-77). These facts were known to respondents' Trainmaster who ordered the medically unsupervised "field test" three days later. In this regard, the Trainmaster testified:

"* * * Q. Now, Mr. Clark, isn't and hasn't it been the history of the railroad when a man was unable to perform his duties and going to retire, that it became a medical question if it was for a physical disability? Weren't the doctors called in on all of these cases?

A. Well, yes, and the doctors will always be called in on a physical disability case.

Q. Now, did you at that time tell Bert Smith to go to the chief surgeon for a physical examination?

A. No, I didn't, because just prior to that he had just been given a release to return to work.

Q. He'd been given a release by your chief surgeon that he was able to perform the duties of a flagman?

A. I think it was by Dr. Nash.

Q. One of the members of the staff.

A. Yes.

Q. Of the railroad. Now, before you gave this test did you consult with Dr. Nash or Dr. Lockwood or any of the doctors on your staff, medical staff, and medical department?

A. No, I didn't, because as I say, that just prior to this test they had, it was in their opinion that he was physically able to perform the duties of a trainman. . ." (R. 34).

In stating his supposed reason for refusing to accept the medical department's opinion in petitioner's case, the Trainmaster stated:

"* * * Yes, that is the opinion of the medical department, that he has recovered sufficiently to go to work. Now, however, the doctors do not have the facilities nor the equipment to actually test a man to see whether—and they're not familiar enough with the duties of each employee to know whether or not he could actually perform the duty in which service he is employed." (R. 24).

On the other hand, the railroad's chief surgeon, who had previously found petitioner fit for duty, testified he had been with the railroad since 1930 and had a "fair idea" of the general type of work done by various railroad employees (R. 71). In fact, he had on occasions consulted with respondents' supervisors and had advised that certain prescribed field tests be performed (R. 74). Had respondents' Trainmaster been sincere in his opinion

as to the medical department's ignorance, it would have been a simple matter to inform the doctors of the required duties and have requested that petitioner be tested accordingly.

No Such Test Ever Given Before

The following testimony shows the uniqueness of the actual test petitioner was forced to take:

Dr. Lockwood [Respondents' Chief Surgeon]

"Q. Now, Dr. Lockwood, I'd like to ask you if you will tell the jury, if you know, in your 30 years' experience, where a trainman was ever taken out and made to walk a mile down the track.

A. No, I don't know of such test having been performed before.

Q. To your knowledge, there has never been such a test made?

A. That's right." (R. 74).

C. T. Clark [Respondents' Trainmaster]

"Q. But this is the only time that anybody in the history of the Florida East Coast ever gave this kind of test.

A. To my knowledge.

Q. To your knowledge.

A. Not this kind of test.

Q. This type of test that was given to Bert Smith.

A. That's right." (R. 44).

P. J. Baumberger [General Chairman Brotherhood of Railroad Trainmen]

"Q. Mr. Baumberger, before we go into the actual details of the test, you've been associated in and around the Florida East Coast since 1912?

A. Yes, Sir.

Q. Have you ever heard or are you aware of any tests such as was being conducted, by anybody on the Florida East Coast?

A. No, sir; I have no knowledge of it." (R. 101).

Flagmen Do Not Have to Walk a Mile

Respondents devote the major portion of their brief to the argument that flagmen must walk a mile in emergencies, and that the mile-long field test was a fair test of a flagman's physical requirements. Admittedly, there is no rule specifying that flagmen must go back a mile to protect the rear of the train (R. 45). Petitioner testified, "You don't never have to walk no mile." (R. 153).

The railroad's rule merely provides:

> "When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with flagman's signals a sufficient distance to insure full protection, placing two torpedoes, and when necessary, in addition, displaying lighted fusees." (R. 57-58).

Petitioner worked the railroad's run from Miami to Fort Pierce, which is protected in its entirety by an automatic block signal system (R. 18-19). This system is:

> ". . . an electrical device that indicates by lights, which there's three lights on a mast—they indicate green for proceed; yellow for caution; and red for stop. And they're located approximately a mile apart . . ." (R. 19).

Under the block system, the first block-mile behind a train shows a red light; the second block-mile back displays a yellow light; and a following train must stay in the third block back to get a green light (R. 19). Should the light for any reason, fail to burn, "A dark indication

or no indication at all is the most restrictive indication of any signal." (R. 226). In addition, a dark indication causes the block behind to flash yellow which warns an engineer "to reduce his speed immediately and prepare to stop." (R. 255).

The record discloses no set of circumstances where the block signal system could fail to warn of an impending collision. Even assuming some unheard of malfunction did occur, a flagman still does not have to walk a mile to protect the rear of his train. He can drop off a fusee (lighted flare) as his train is slowing down (R. 129, 133). The fusee can be seen a half mile away during the day and for eleven miles at night (R. 107-108). In addition, petitioner testified that if a train were coming, you could flag it down before you could walk back to the preceding block signal (R. 146).

Petitioner Had Always Done His Job Properly

Petitioner was declared physically fit by respondents' medical department and had worked for thirty-six years without a single demerit (R. 29, 135, 142-143, 232-233). A co-employee who knew petitioner well, testified he had checked on petitioner and had noticed no change in his ability to get around—"he got around just about as fast" (R. 130, 128, 111).

Respondents' Version of Facts Rejected by Jury

Respondents' version of the facts was rejected by the jury which awarded petitioner a $30,000.00 verdict. In making this determination, the jury had ample evidence before it that petitioner was physically fit and subjected to an unheard of and unfair "field test" on the worst spot in the whole railroad (R. 247) in an effort to force his retirement.

Assuming *arguendo* that petitioner was having physical difficulties, the jury still could have found for petitioner on the theory that respondents were negligent in requiring a sick employee to walk a mile. Cf. *Nuttall* v. *Reading Company*, (3rd Cir., 1956) 235 F.2d 546; *Dunn* v. *Conemaugh & Black Lick Railroad*, (3rd Cir., 1959) 267 F.2d 571. Respondents are in error in claiming that petitioner abandoned this theory below (Brief of Respondents, pp. 6-7, 17). The trial judge held this theory was covered by the allegations held improper on the first appeal and that petitioner could not raise the issue on the second trial (R. 333-335, 350). The only reason the amendment (expressly stating the forced-to-work-while-sick theory) was abandoned on appeal was that it was covered by the original allegations which remained in the case. The trial judge had held the theory covered by the general allegations that respondents were at fault in "negligently and unlawfully requiring plaintiff to participate in such a 'field test'." (R. 2).

CONCLUSION

It is again respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

WILLIAM S. FRATES, of
NICHOLS, GAITHER, GREEN,
FRATES & BECKHAM,
1111 Brickell Avenue,
Miami 32, Florida,
Counsel for Petitioner.